Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. ON FURTHER NOTICE OF PROPOSED RULEMAKING

QWEST COMMUNICATIONS
INTERNATIONAL INC.
Blair A. Rosenthal
Robert B. McKenna
Timothy M. Boucher
Daphne E. Butler
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6650

Its Attorneys

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Qwest Communications International Inc. ("Qwest") hereby submits its comments on the Further Notice of Proposed Rulemaking[1] in the above-captioned docket.

I. INTRODUCTION AND SUMMARY

The need for rapid and decisive action by the Federal Communications Commission ("Commission" or "FCC") to rationalize the system of intercarrier compensation is one of the most pressing issues currently before the FCC. The entire system is fatally flawed, with carriers paying and receiving vastly different amounts for services which are often functionally identical. The tariffed access structure cries out for correction, as carriers and others try to reduce costs by juggling interstate and intrastate jurisdictional issues with the end user status afforded local ISP points of presence under the ESP exemption. Access charges themselves are dramatically different than the reciprocal compensation structure pursuant to which local exchange carriers ("LEC") and commercial mobile radio service ("CMRS") carriers exchange traffic. Some services, such as Internet Protocol ("IP") voice services, are currently eligible for local interconnection (to a local Internet Service Provider ("ISP") point-of-presence ("POP")) under

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (rel. Mar. 3, 2005) ("Further Notice"); a summary of the Further Notice was published in the Federal Register on Mar. 24, 2005 (70 Fed. Reg. 15030).

the so-called "ESP [enhanced service provider] exemption," despite the fact that the access services provided by an incumbent LEC ("ILEC") to terminate an IP voice call are identical to those used to terminate any other call.[2] In the case of ISP-bound traffic, whole industries have grown up based solely on leveraging an ILEC's obligation to pay for "termination" of an ISP call to a competitive LEC ("CLEC") customer (requiring an ILEC to actually pay another carrier for the use of the ILEC's own facilities -- skewing the market dramatically and creating an arbitrage opportunity of breathtaking proportions).[3]

In fact, for the most part there is almost no difference (if any) between the connecting functions among carriers involved in originating or terminating an interstate long distance call, an intrastate long distance call, an IP voice call, a local call, or any other call that makes use of local exchange switching facilities and common lines. Yet the rates for each are dramatically different.

Qwest submits that, until the Commission has acted to adopt and implement a rational and economically sound plan for intercarrier compensation, the development of a competitive

[2] *See Ex Parte* Presentation of Qwest, WC Docket No. 03-266, *In the Matter of Petition of Level 3 Communications LLC for Forbearance Under 47 U.S.C. Section 160(c)* and WC Docket No. 04-36, *In the Matter of IP-Enabled Services*, dated Mar. 11, 2005, at 2-3 and Attachment A, for a description of the background of the ESP exemption and its application today to IP-enabled services.

[3] This is highlighted by the two massive access charge frauds perpetrated by AT&T Corp. ("AT&T"), where AT&T and others sought to manipulate the Internet Protocol and calling card platforms in an effort to reduce their switched access charges. *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* WC Docket No. 02-361, Order, 19 FCC Rcd 7457, 7465-72 ¶¶ 12-24 (2004); *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 ¶¶ 14-37 (2005); *see also* associated Statement of (former) Chairman Michael K. Powell. Carriers are devising ways to avoid payment of access charges by disguising the nature of their traffic, as was the case with AT&T and others. *See*, *also*, *e.g.*, P. Huber, M. Kellogg, J. Thorne, *Federal Telecommunications Law* §§ 2.4.4.2, 2.4.4.3, 2.4.4.4, 2.4.4.5, 2.11.2.5.1 (2d ed. 1999 & Supp. 2004), for a description of the market and other distortions that have evolved along these lines.

telecommunications market in the United States will not only be dramatically retarded, but possibly endangered. The current system is so arbitrary that it simply cannot be sustained for much longer.

Qwest's solution to the intercarrier compensation morass is simple and straightforward. Called "bill and keep at the edge," Qwest's plan puts the onus on a carrier desiring to interconnect with another carrier to bring its traffic to the "edge" of the terminating carrier's network (as is defined herein), at which point the traffic is exchanged on a bill and keep basis. In those circumstances where the "edges" of the two networks are not adjacent, it is the responsibility of the originating carrier to deliver the call to the terminating carrier's edge. We recognize that a situation where two carriers were delivering their traffic independently to each others' network edges would be inefficient, a fact that we assume all other carriers would similarly recognize -- motivating them to negotiate appropriate mutual transport arrangements. Should either carrier desire to utilize the services of a transiting carrier to carry traffic to a terminating carrier, the transiting services would be available at market rates pursuant to carrier-to-carrier contracts subject to FCC jurisdiction. The structure would apply to all exchanges of traffic between carriers in which local telephone exchange or exchange access services are provided. The Qwest plan itself is described in detail below.

The Qwest bill and keep at the edge plan applies only to the exchange of traffic (and interconnection) where circuit switching by the LEC is involved. It does not displace or in any way modify LEC special access tariffs or the right of LECs to charge special access for high capacity dedicated services provided to other carriers behind the respective edges of their networks. Special access services are offered to other carriers to enable them to serve their own customers, not part of interconnection among carriers for the exchange of the traffic of the carriers' respective customers. Special access services are not part of the bill and keep proposal described herein. What is more, as is discussed in detail below, adoption of any bill and keep plan will require substantial rate and revenue rebalancing in order to allow carriers an opportunity to recover the revenues lost from existing switched access services. If the FCC were to adopt a structure whereby ILEC special access services were brought into a bill and keep status, the financial impact that would need to be addressed would be considerably larger. Because special access services do not fit within the ambit of intercarrier compensation, which functions to permit each carrier the opportunity to service its own customers, but instead are services that permit a carrier to extend its own network to its own customers, there is no reason to include special access services in the bill and keep structure. We do not address special access further herein.

Moreover, it must be kept in mind that the bill and keep structure applies only to delivery of traffic to and exchange of traffic with other carriers. Should a carrier desire to purchase additional access services beyond the mere delivery of traffic (for example, some signaling[4] or information), these services would continue to be purchased pursuant to the regulatory structure the FCC establishes for them (currently tariffed Feature Group D access service provides a variety of functions beyond simple traffic delivery that interexchange carriers ("IXC") may desire to purchase outside of the bill and keep regime recommended herein).[5]

The Further Notice contains a detailed Staff Analysis documenting the economic principles which support a bill and keep compensation structure.[6] This analysis is thoughtful and

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[4] That is, signaling services, as opposed to the signaling information delivered as part of normal call delivery.

[5] For example, such services could include signaling 800 database access service, and carrier information parameters. *See* Qwest Corporation Tariff F.C.C. No. 1, Section 6.3.

[6] *See* Further Notice, 20 FCC Rcd 4685 at App. C (hereinafter "Staff Analysis").

thorough. Unless otherwise specified herein, Qwest supports the Staff Analysis in its entirety, and does not repeat that analysis here.

It is vital that this new plan adhere closely to the basic principles of the Act and sound economics.[7] It must be competitively neutral, non-subsidizing, and economically rational. Adhering to these objectives in the context of a system that has developed, in some cases, over the course of a century, will not be easy, as the length of this docket thus far amply demonstrates. The plan must also be careful not to increase the current size of the federal universal service obligations -- the size and scope of which are already well beyond anything that could rightly be considered reasonable. There will undoubtedly be some icons that get damaged in any reasonable FCC structure -- the mere fact that some aspects of the Qwest plan are controversial or potentially unpopular does not detract from their fundamental reasonableness or from the urgency of the need for true reform.

The entire structure, with the limited exceptions described below, would be subject to federal jurisdiction. This includes replacement of intrastate access tariffs and regulation of transiting with the charging structure described herein. There is no question that intercarrier compensation reform will be essentially meaningless if limited to "interstate" services, however that term may be ultimately defined. The FCC has plenary jurisdiction over the exchange of traffic involving LECs pursuant to Section 251(b)(5) of it's the Act,[8] and state access charges remain in place temporarily subject to that federal jurisdiction pursuant to Section 251(g) of the Act.[9] If necessary, the FCC has the authority to preempt state access charges in order to

[7] The Further Notice spells out the perceived goals of intercarrier compensation reform at paragraphs 30-36. Qwest agrees that these goals are reasonable and appropriate. Some of these goals are discussed at page 22, *infra*.

[8] 47 U.S.C. § 251(b)(5).

[9] 47 U.S.C. § 251(g).

implement a rational intercarrier compensation regime as part of its authority over intercarrier interconnection matters generally, but we believe that exercise of federal preemptive jurisdiction is not necessary because Section 251(b)(5) of the Act is a direct jurisdictional grant that does not need further analysis or preemptive action.

A move to bill and keep for all carrier exchange of traffic will, of necessity, require that the FCC take immediate and comprehensive action to ensure that the revenues that carriers currently receive from interstate and intrastate carrier access charges are subject to recoupment from other sources. This is an absolute requirement from both a statutory and a constitutional perspective. Qwest submits that the best replacement source for these revenues is from the customers of the affected carriers, and that the best mechanism for replacement is a flat rate charge on subscriber lines. Given the federal responsibility in this area, this charge should be a federally administered subscriber line charge increase.[10] In order for the FCC to accomplish this subscriber line charge increase to make up for foregone intrastate access revenues, it is necessary for the FCC to take appropriate action to assume jurisdiction over these revenues and the costs associated with them.

Qwest submits that the best approach is for the FCC to move immediately to convene a joint board pursuant to Section 410(a) of the Act to determine how to quickly accomplish the necessary jurisdictional shifts to permit implementation of a comprehensive bill and keep intercarrier compensation regime. It is apparent that this separations shift must actually be in place before actual implementation of any federal intercarrier compensation regime, and the FCC should move immediately to designate the issue for either one of the existing federal-state joint boards or to establish a new joint board for this purpose. The joint board should be given strict

[10] Despite the FCC's plenary jurisdiction over intercarrier compensation matters, the Act vests no such authority in the FCC over local end user telephone rates not in the FCC's jurisdiction.

timelines for action in order that the federal intercarrier compensation plan is able to remain on an even jurisdictional keel and the Commission is able to fulfill its statutory mandate that carriers be afforded the opportunity to recoup lost access revenues from other sources.

The plan to ensure that ILECs have an opportunity to recover lost access revenues would function simply. Each ILEC would have the opportunity to increase its federal subscriber line charge ("SLC") to the level that would reflect, on a per line basis, the total amount of its annualized access revenues (including increases or decreases for reciprocal compensation). The FCC would also establish a national average "benchmark" rate set at 125% of the national weighted average of urban business and residential rates, interstate SLCs and intrastate SLCs. If the new rate (including the added federal SLC) exceeded the benchmark, the ILEC could petition the FCC to permit it to implement an interexchange termination charge that accounted for all or part of the amount in excess of the benchmark.

Qwest recognizes that a transition plan must be utilized to enable carriers and customers alike to make the adjustments necessary to implement the Qwest plan. While others have suggested protracted transition plans, Qwest suggests that a transition of no more than three years is quite sufficient to allow for full plan implementation. However, several reforms must be undertaken immediately: 1) the FCC must clarify that transiting services provided by any LEC are not part of exchange access or local exchange service as those terms are contemplated in the Act, but instead are interconnection services among carriers governed entirely by federal common carrier law (*i.e.*, Sections 201, 202 and 211(a) of the Act) as it relates to intercarrier interconnection outside of Sections 251(b) and (c) of the Act; 2) the Commission must clarify that so-called VNXX traffic must be treated as local or non-local based on the locations of the parties (with ISP POPs continuing to be treated as end-user customers for this purpose[11]) rather than on the specified telephone numbers of the end users;[12] 3) the Commission must eliminate the intra-MTA rule for LEC-CMRS traffic and define the local service area for such traffic as the ILEC local calling area; and 4) ISP traffic must be moved to bill and keep immediately.[13] In addition, no plan can be implemented without first undertaking the necessary separations changes to permit ILECs to recover lost intrastate access revenues through the federal SLC.

Finally, the Commission must deal up front with the issue of compensation of independent LECs, many of whom continue to lobby for sources of funding beyond existing universal service capabilities and their own ability to charge their own customers. Qwest fully supports rational and non-discriminatory funding for universal telephone service. But there is a limit to which independent LECs can be subsidized without risk to the vitality of the entire plan, and the total size of the universal service funds cannot be increased.[14]

II. THE COMMISSION SHOULD ADOPT QWEST'S BILL AND KEEP PLAN FOR INTERCARRIER COMPENSATION

A. Qwest's Bill And Keep Plan

1. Structure of Qwest's Bill and Keep Plan

Qwest's bill and keep plan is slightly different than the bill and keep at the edge plan espoused by Qwest in its initial comments in this docket**.** In particular, Qwest seeks to address several issues relating to smaller carriers and state jurisdiction that have become more pointed

[11] As noted below, ISP "reciprocal compensation" must be terminated immediately.

[12] Obviously this does not apply to interconnection agreements that specify that the local telephone numbers, rather than the location of the parties, will govern compensation.

[13] Each of these four enumerated items can and should be enacted immediately through declaratory or other appropriate relief and, therefore, fall outside of the proposed four-step, three-year transition to bill and keep.

[14] Obviously the amount of lifeline funding will need to increase because of the increase in the amount of the SLC charge.

since this docket commenced.[15] However, Qwest continues to support bill and keep as the most economically rational approach to intercarrier compensation, and puts forth these minor modifications as a matter of necessity, not by way of concession that deviation from a pure bill and keep approach would ultimately be more efficient or better for the public or the telecommunications marketplace. Thus, we continue to find it inescapable that bill and keep is a superior method of intercarrier compensation. Qwest's bill and keep at the edge plan creates incentives for efficient network design.

The defining attribute of bill and keep is a default division of financial responsibility, at some point between two networks, for the costs of handling traffic that travels over both networks.[16] In the absence of a negotiated agreement between two carriers dividing the responsibilities differently, each carrier must recover from its end users, and not from other carriers, all network costs on its side of that point. Qwest has referred to this point as the "financial point of interconnection" or "financial POI."[17] The regulatory task in a bill and keep framework is to define a technology-neutral rule for the financial POI that would be applicable to any hand-off of telecommunications between telecommunications carriers on the public switched network. Default rules should allow the financial POIs to coincide with workable physical POIs in as many cases as possible. Such default rules would avoid the necessity of resource-consuming interconnection negotiations between carriers. Qwest believes that the best financial POI is at the "edge" of each carrier's network.

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[15] Qwest anticipates that its position may further evolve as it is able to internalize the thoughts of other commentors as they are filed.

[16] Each carrier is responsible for the physical facilities necessary to deliver the traffic to the edge of the other carrier's network as well.

[17] *See* Comments of Qwest, filed herein on Aug. 21, 2001, at 23.

Qwest believes that the appropriate default rules for designation of the POI or the "edge" are:

1. Each carrier is responsible for recovering the costs of its own network from its own subscribers with the exception of costs associated with the provision of transiting traffic.

2. Each carrier must establish an "edge" of its own network in each LATA in which it intends to receive traffic.[18] At a minimum, the "edge" must be placed so that all switching type functions provided by the carrier are included within that carrier's network. For a hierarchical circuit switched network, the "edge" will be at the access tandem location serving the subscriber's local switch. For a non-hierarchical circuit switched network, the "edge" will be at the local switch location serving the subscriber. If no switch is located in the LATA to be served, an "edge" must be established in the LATA to be served. The cost of facilities between the distant switch and the "edge" are the responsibility of carrier that has chosen not to put a switch in the LATA. For an IXC, the edge will be its points of presence ("POPs") in each LATA.

3. The originating carrier is responsible for paying the cost of facilities transporting traffic to another carrier's "edge." Such cost will be recovered from the originating carrier's subscribers.

4. In the case where an originating carrier utilizes a transiting carrier for transport to another carrier's "edge," the transiting carrier may charge due compensation to the carrier originating the traffic to the transiting carrier based on reasonably negotiated contracts. Transiting should be offered via intercarrier contracts negotiated between carriers, subject to Section 201(a), 202(a) and 211(a) of the Act, but not presumptively regulated by the Commission. The originating carrier will recover such costs from its subscribers.[19]

These rules would apply in the absence of a negotiated agreement to the contrary. In the case of a dispute regarding the location of the POI, the carriers would have the opportunity to seek arbitration of the dispute.

Under Qwest's plan, division of responsibility at the financial POI would replace the current scheme of reciprocal compensation for local traffic and switched access for intrastate and

[18] Carriers can have multiple edge locations within the LATA.

[19] The rules are set out in an ex parte (and attachments) from John W. Kure, Qwest to Marlene H. Dortch, FCC, filed herein on Aug. 2, 2002.

interstate interexchange traffic.[20] Enacting bill and keep will be a departure from the Commission's current rules for local traffic, enacted pursuant to 47 U.S.C. § 251(b)(5), under which a terminating carrier recovers transport and termination costs from the originating carrier, and its other costs from its own customers. Under bill and keep the terminating local carrier will also recover its costs of termination (and any transport from its edge) from its subscribers. Bill and keep will also be a departure from the current rules for interexchange traffic under which the IXC pays for local exchange access at both the originating and terminating points of the call. Under bill and keep the originating LEC recovers its originating access costs from its subscribers, the IXC recovers its own transport and other costs from its subscribers, and the terminating LEC recovers its terminating access costs from its subscribers. Thus, under bill and keep if a LEC has chosen an inefficient architecture the LEC must recover the costs directly from its end users, not the IXC.

Requiring the terminating carrier to internalize the costs of transporting a large portion of the call behind the edge of its network will have the desirable consequence of incenting that carrier to optimize the efficiency of its network. Thus, under Qwest's plan, one carrier cannot be forced to pay for another carrier's choice of network architecture. The most significant flaw in the current scheme, as noted in the Staff Analysis, is that a terminating carrier can essentially force an originating carrier to incur useless network inefficiencies (or, in the case of one-way traffic such as ISP traffic, to make windfall and uneconomic payments to another carrier having nothing to do with reasonable interconnection). There is, in effect, an economic incentive to be inefficient. Qwest's default rule requiring one carrier to deliver traffic to the other carrier's edge eliminates that incentive.

[20] Special access is the subject of a separate proceeding, and is not at issue here. Interconnection between adjacent non-competing LECs already occurs on a bill-and-keep basis in most instances.

2. Qwest's Bill and Keep Plan Contains the Necessary Element of Revenue Neutrality

As is discussed in more detail below, the FCC has the statutory and constitutional responsibility to ensure that any intercarrier compensation plan adopted, including the Qwest bill and keep at the edge plan, permits affected carriers the reasonable opportunity to regain through other sources the interstate and intrastate access revenues lost upon implementation of the plan.[21] The Qwest plan addresses this issue as follows.

Under the Qwest plan, as the first and primary step for recovering forgone intercarrier compensation, the federal SLC will be permitted to increase such that the combination of the residential and business rates, any state SLC and the federal SLCs (all weighted by lines) would be increased to the lower of a national benchmark (assuming they are below the benchmark) or the level needed to recover the foregone intercarrier compensation. The national benchmark rate would be set based on the total of ILEC single line residential and business rates, intrastate SLCs and interstate SLCs for urban wire centers, weighted and calculated as of the last day of the base year. Added to this amount would be the foregone intercarrier compensation (*i.e.*, annual interstate and intrastate switched access and net reciprocal compensation) offset by any continuing transiting charges and interconnection revenues.[22] The benchmark rate would be set at 125% of the national average of these urban rates, including the national average of foregone compensation for urban carriers.[23]

[21] *See* Section III, *infra*.

[22] ILECs incurring reconfiguration costs caused by the new regime could add reasonable reconfiguration costs to the amount of access charges forgone.

[23] For carriers whose total rates for the affected elements would exceed the benchmark if all foregone compensation were included, additional recovery mechanisms are discussed below.

At that point each ILEC[24] will have, for each study area, three numbers: 1) its weighted average of business and residential rates; 2) the total allowed amount for recovery of its own foregone access and reciprocal compensation net revenue; and 3) the amount of the total foregone access and reciprocal compensation payments that would not be recovered if the ILEC moved the total of its local rate, any state SLC and federal SLC to the benchmark level, including the increase in the federal SLC. If the ILEC so chose, the remainder (*i.e.*, that is not recovered by moving the combined rate to the benchmark level) could be recovered through a termination charge on interexchange traffic, upon Commission approval.

The initial differential (*i.e.*, the amount necessary to increase rates to reach the benchmark) would be recovered through the federal SLC. SLCs would increase by 25% of the ultimate level for each step in the three-year, four-step transition plan.[25] To the extent that an ILEC, having increased its rates to the benchmark level, still has not been able to recover the lost access revenues in its rates, the difference can be made up from an interexchange termination charge upon an appropriate showing to the Commission. This charge, which would be a federal intercarrier compensation charge assigned to carriers only, would be calculated to collect only the amount not otherwise recovered or recoverable as described above.[26] The termination charge would be phased in on the same percentage schedule as the other rate increases described herein.

[24] Because CLEC rates are not regulated, this analysis generally applies only to ILECs.

[25] Independent telephone companies who participate in the NECA traffic sensitive pool will also have pooling for the increased SLC revenues that offsets foregone intercarrier compensation.

[26] Unregulated LECs (generally CLECs) in an area where an ILEC was charging a termination charge under these rules could charge their own termination charge up to the amount assessed by the ILEC.

Because the termination charge applies only to carriers, it would not be applicable to Information Service Providers ("ISPs") (under a properly applied ESP exemption)[27] or "true VOIP" service.[28]

To the extent that a carrier has its local rate/SLC combination above the benchmark at the time the benchmark is calculated, it can reduce its total rates (as described above) to the benchmark and make up the difference from the interexchange termination charge on petition to the FCC.

3. Qwest's Bill and Keep Plan Retains the End-User Status of ESP/ISP POPS.

Enhanced Service Providers (or Information Service Providers -- the terms are synonyms for present purposes) have, for the past twenty years, connected their local POPs to the public switched telephone network ("PSTN") as end users rather than carriers.[29] When moving to bill and keep, the Commission should maintain this distinction between a carrier's connection and an Enhanced Service Providers' (ESP's or ISP's) connection based on the end-user status of an ESP or ISP POP. Accordingly, under Qwest's plan, an ISP (including an IP-Voice provider) will not be entitled to interconnect with a LEC on a bill and keep basis like a carrier, but will continue to purchase local and toll services like any other end user. "True IP-Voice," meaning an application that provides real-time, two-way voice capability originating in the Internet Protocol

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[27] The ESP exemption allows ESPs and ISPs to treat their ESP/ISP POPs as end-user premises, and to obtain local access to an exchange as any other similarly located end-user premise. Some CLECs have taken the position that the ESP exemption provides that all information service traffic, from whatever location, is "exempt" from the payment of access charges. While this argument may seem facially frivolous, as is discussed below it is a significant problem and the FCC must clarify that the ESP exemption is no broader than the simple classification of an ESP/ISP POP as an end-user premise for access charge purposes.

[28] "True VOIP" is a voice application that originates in IP protocol over a broadband connection. True VOIP is an information service and is entitled to the same regulatory treatment of other information services.

[29] *In the Matter of MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 682 (1983).

over a broadband connection, is an information service, rather than a telecommunications service.[30] Accordingly, true IP-voice providers, under Qwest's plan, will continue to connect to the PSTN as end users. In light of the industry confusion as to whether access charges apply to IP-voice calls that are carried on the PSTN, Qwest asks that the Commission immediately confirm that the ESP exemption applies to true IP-voice. However, in so clarifying, the Commission must clearly specify that the ESP exemption is in fact nothing more than an end-user classification of an ESP or ISP POP and that the POP is treated as any other end user for interconnection and carrier purposes. Accordingly, pending full implementation of bill and keep at the edge, the clarification must also specify that an ESP or ISP POP (of any nature) located outside of the local calling area of the second party to a call must be treated in the same manner as any other end-user premise for purposes of determining the appropriate access, toll or reciprocal compensation charges to be assessed.

4. Qwest's Plan Requires Coordinated Action Between the State and Federal Jurisdictions

In order for the Qwest plan, or any other plan that relies on bill and keep, to be workable, it must apply to intrastate traffic as well as interstate traffic. Moreover, state rules must conform to the bill and keep scheme in the same time frame as traffic in the interstate jurisdiction. If interstate traffic were exchanged on a bill and keep basis, while intrastate traffic were subject to a different scheme (such as the current tariff scheme), the resulting chaos and arbitrage opportunities would clearly be unacceptable. A multiplicity of access rating systems and approaches based on traffic jurisdiction would not only present a huge arbitrage opportunity, it would also be well nigh impossible to implement in Qwest's billing systems. A dual

[30] *See* discussion in Comments of Qwest, WC Docket No. 04-36, *In the Matter of IP-Enabled Services*, filed May 28, 2004, at 14-24.

interstate/intrastate tariffed access system would be unworkable. Fraudulent presentation of traffic could potentially become more prevalent than it is today under the existing intercarrier compensation regime. For example, if interstate traffic has gone to bill and keep, but intrastate traffic remained subject to access charges, IXC's could route intra-LATA toll traffic so that the traffic appears to be interstate in an attempt to avoid intrastate access charges more easily than occurs today.

Changing the local and interstate interconnection at the same time is also essential to efficient transition of network routing, network capacity provisioning, and billing systems that changes would otherwise be complicated with the churn caused by changing interstate and intrastate interconnection at different times. For example, if interstate traffic were to move to bill and keep and intrastate traffic were to remain subject to access charges, it could be necessary to make network planning decisions based upon detailed predictions of the relative levels of interstate and intrastate traffic. Changing interstate and intrastate interconnection at the same time is vital to preventing adverse impact to carrier's end-user customers and reduces the potential impact to interconnecting carriers.

Obviously coordination between state and federal regulators is a vital element of implementing this plan. As is discussed below, the FCC has the authority to adopt a bill and keep plan for all intercarrier traffic. This is also true in the critical area of ensuring that ILECs have a reasonable opportunity to recover access charge revenues forgone in the plan from their own customers. In fact, without such an opportunity the entire plan would be unlawful. Qwest submits that, since this is a federal plan, the recovery authority and responsibility rests with the FCC, and only a federal SLC charge can reasonably be relied on to effectuate such necessary recovery. The best way to give the FCC necessary and unquestioned authority to enact a federal compensation mechanism, while ensuring state participation in a meaningful fashion, is through a separations modification that moves the revenue, costs and investment currently recovered through intrastate access charges into the federal jurisdiction via the mechanism of a federal-state joint board convened pursuant to Section 410(a) of the Act.[31] Because the separations modifications necessary to the adoption of the plan must be in place before the plan can begin to be meaningfully implemented, the FCC should begin the joint board process immediately, probably by referring this issue to the federal-state joint board that is scheduled to be convened this summer.[32]

5. Qwest's Plan Offers a Market-Based Transiting Solution

Transiting as a separate issue is discussed at some length below.[33] Under Qwest's plan, transiting simply becomes the vehicle by which a carrier fulfills its responsibility to transport traffic to the edge of another carrier's network. Because it is the originating carrier's responsibility to get its traffic to the edge of the terminating carrier's[34] network, the choice to use a transiting carrier lies with the originating carrier. This approach is the approach required by the Act and is most consistent with the important policy goals set forth in the Further Notice.

6. Qwest's Bill and Keep Plan Does Not Require Additional Universal Service Funding

Qwest's bill and keep plan does not envision increasing the total amount of universal service support currently distributed from the various universal service funds. As Qwest has pointed out in other contexts, the size of the federal universal service funding efforts is already

[31] *See* 47 U.S.C. § 410(a).

[32] *See* Notice of Public Information Collection(s), 70 Fed. Reg. 11971 (Mar. 10, 2005).

[33] *See* Section IV, *infra*.

[34] For these purposes an IXC is treated as a terminating carrier when traffic is destined to an IXC's network, even though it would be improper to classify an IXC as a terminating carrier for most purposes.

considerably higher than is reasonable and should not be increased. Accordingly, the Qwest plan relies on the combination of benchmark pricing evaluation, increased federal SLCs, and, where necessary, interexchange termination charges to give carriers the reasonable opportunity to recover forgone interstate and intrastate access and reciprocal compensation payments. Universal service reform must, of course, be continued, and remains in itself an urgent matter. It is not a key element of Qwest's intercarrier compensation plan, nor should it be. In fact, Qwest submits that the total amount of universal service funding should not only not be raised as part of an intercarrier compensation reform plan, but should be formally capped to prevent inadvertent increases in the future.

We recognize that one aspect of universal service must be addressed in the context of the Qwest bill and keep plan. Qwest's plan requires an increase in the federal SLC. This increase will increase the number of people eligible for relief under federal lifeline programs, and lifeline funding should be increased accordingly.

7. Qwest's Bill and Keep Plan Offers a Smooth Transition

Qwest proposes a three-year, four-step transition. During the first two years existing intercarrier compensation (including access charges and reciprocal compensation) will decrease and the federal SLC will increase towards the benchmark. Carriers will continue to physically interconnect their networks as they always have under the current Calling Party's Network Pays ("CPNP") regime. The third year there will be a "network flip." As described above, the network flip occurs when interconnection rules move from the current structure to the edge rules.

B. Qwest's Bill And Keep Plan Meets The Commission's Goals

1. Bill and Keep is the Most Economically Rational Intercarrier Compensation Scheme

Bill and keep is the most economically rational intercarrier compensation system. Qwest provided extensive analysis of the economic benefits of bill and keep in its comments and reply comments in response to the NPRM.[35] The Staff Analysis comprises a thorough and concise analysis of the economic rationale for choosing a bill and keep system. Accordingly, these comments simply summarize the benefits of bill and keep as the record already contains Qwest's more detailed explanation of bill and keep's merits. Briefly, bill and keep is an economically superior solution for the following reasons.

First, because both the calling party and the called party may both generally benefit from any given call, the originating and terminating networks should share the costs associated with the call by recovering their costs from their own end-user customers.[36] There is no rational economic nexus between cost causation and the identity of the "originating" carrier. To the contrary, in many cases, ISPs providing the most dramatic example, the major "cost causer" in a telephone call may be the terminating customer and the terminating customer's carrier. This is especially onerous and disruptive in a situation (again typified by ISP "reciprocal compensation") wherein the originating carrier is under a regulatory constraint to deliver traffic to a terminating carrier even when such delivery is not only uneconomic but potentially ruinous -- in a free market the originating carrier would make the decision not to engage in such an uneconomical transaction.

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[35] *See* Comments of Qwest, filed herein on Aug. 21, 2001, at 7-21; Reply Comments of Qwest, filed herein Nov. 5, 2001, at 3-30.

[36] Further Notice, Staff Analysis, App. C, at p. 98.

Second, a CPNP approach allows carriers to shift costs to other carriers, which is especially problematic in a competitive market. Even a CPNP regime unified at one rate allows carriers to shift costs to their competitors, rather than recovering the costs from their subscribers. There is, of course, a very powerful economic incentive to raise the costs of one's competitors where possible, especially if such cost shifting can result in increased revenues to the cost shifter. But doing so distorts the pricing signals received by consumers. Because bill and keep puts all carriers in a position where they must recover their own costs from their own retail or wholesale customers, success in the marketplace will reflect a carrier's ability to serve customers efficiently, rather than its ability to extract payments from other carriers. The massive disruptions described in the ISP Remand Order are caused by the diseconomies inherent in a CPNP structure.[37]

Third, an intercarrier compensation scheme, such as CPNP, that requires termination payments create the opportunity for the terminating carrier to exploit pricing power due to the terminating monopoly.[38] This phenomenon has caused the Commission to regulate the maximum access charges that can be charged by CLECs, whose rates are otherwise subject to

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[37] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("ISP Remand Order"). *See* Section IV.D., *infra* for a discussion on bill and keep structure for ISP traffic..

[38] The terminating monopoly exists because the terminating carrier has a monopoly over the facilities serving the end user who receives calls because any interconnecting carrier attempting to reach that customer must use the terminating carrier's network. Therefore, the terminating carrier may attempt to unilaterally impose unreasonable termination charges which the originating carrier cannot avoid. In many cases, because of the rate-averaging requirement, for example, the originating carrier cannot pass these charges on to the originating caller. The market fails to exert pressure to moderate these unreasonable termination rates, and regulation is needed. *See* Further Notice, Staff Analysis, App. C, at p. 104. The ISP reciprocal compensation problem is the most obvious, but not the only manifestation of this problem.

competitive market forces.[39] Under bill and keep, the terminating carrier must recover its costs from its own end-user customers. This eliminates the ability to charge unreasonable terminating rates because the end-user customer can compare prices and choose the carrier of his or her choice based on that carrier's performance. Bill and keep therefore encourages the development of competition because, as stated above, carriers must compete in the market based upon their ability to serve customers efficiently, not through regulatory arbitrage.[40]

Fourth, because of the terminating monopoly, there is a constant need under a CPNP system to regulate the termination rates that carriers charge each other. Experience has shown that especially in a technologically dynamic market such as the instant telecommunications market, it is simply impossible for regulators to evaluate and establish rates that accurately reflect costs. This is dangerous, because as even bill and keep's opponents acknowledge, arbitrage opportunities arise when regulated rates deviate from costs.[41] What is more, this arbitrage situation is aggravated by each of the factors enumerated above because disparate rates are often established for the same service, causing customers to seek to reduce costs and maximize revenues based on choosing from varying regulated prices for the same functions and services. Thus, under a CPNP system regulators must oversee retail rates, and wholesale termination rates, and expect that they will do so with only limited success in protecting the public interest. As the experience with CLEC access charges shows, the need to regulate

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[39] *See In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

[40] Further Notice, Staff Analysis, App. C, at pp. 103-04.

[41] *See, e.g.,* Comments of AT&T, filed herein on Aug. 21, 2001, at 8. In a competitive market, prices are driven towards cost based on entirely different factors.

wholesale termination rates will never end in a CPNP regime.[42] Under bill and keep, regulators must oversee the transition to the wholesale bill and keep plan. After the transition is completed regulators will mildly oversee only retail rates until competition can be relied on to prevent discriminatory rate practices.

In sum, bill and keep best meets the Commission's goals of promoting economic efficiency,[43] being competitively and technologically neutral,[44] providing regulatory certainty,[45] eliminating arbitrage concerns,[46] and requiring minimal regulatory intervention.[47] Thus, Qwest's plan (and the other bill and keep plans) are superior to the non-bill and keep plans in meeting the aforementioned goals. Moreover, Qwest's plan meets the Commission's additional goals of maintaining reasonable and affordable end-user rates,[48] preserving universal service,[49] and providing a transition that will give carriers time to adjust their business plans.[50]

III. THE FCC HAS THE STATUTORY AUTHORITY TO ADOPT THE QWEST BILL AND KEEP PLAN

Qwest submits that the FCC's authority to adopt the plan described herein is clear. This authority is essentially threefold: 1) the FCC has the jurisdiction to establish a federal structure for intercarrier compensation, that includes replacement of intrastate access charges with the federal bill and keep structure and, pursuant to different statutory provisions, to fulfill its

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[42] *See* note 37, *supra*.

[43] Further Notice ¶ 31.

[44] *Id*. ¶ 33.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* ¶ 30.

[49] *Id.*

[50] *Id.* ¶ 36.

statutory and constitutional mandate to ensure that carriers have an opportunity to recoup lost access revenues through appropriate increases in end-user charges; 2) the FCC has the power to adopt a bill and keep structure for exchange of carrier traffic, especially traffic involving origination or termination with a LEC; and 3) the FCC has authority to adopt a transition plan that provides immediate reform and/or clarification in areas such as transiting, virtual NXX compensation, CMRS traffic and ISP reciprocal compensation. These issues are examined herein.

A. Intercarrier Compensation Is A Federal Issue

The FCC has been granted plenary jurisdiction over intercarrier compensation matters, at least where an ILEC is involved in one end of a call.[51] Historically, intercarrier contracts have been subject to the FCC's jurisdiction,[52] and the plain language of Section 251(b)(5) of the Act ultimately rests authority for intercarrier compensation with the FCC.[53] State (as well as federal) tariffs for intrastate access services remain in place because of the savings language of Section 251(g) of the Act,[54] which contemplates ultimate supervision by the FCC. It must be remembered that the Telecommunications Act itself contemplates federal authority to enact rules and policies in the area of interconnection except in those areas where state jurisdiction is expressly recognized.[55]

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[51] Section 251(b)(5) speaks in terms of termination of traffic by LECs. Federal authority to regulate termination by non-LECs in particularly CMRS provider is established in Section 332 of the Act.

[52] 47 U.S.C. § 211(a).

[53] Section 251(b)(5) applies to all "telecommunications" terminated by a LEC. The D.C. Circuit Court of Appeals has agreed that the scope of this language is broad, although holding that the ultimate issue has not yet been determined. *See WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

[54] 47 U.S.C. § 251(g).

[55] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 381-86 (1999).

We recognize that, in the past, the Commission has limited the applicability of Section 251(b)(5) to "local" traffic, and distinguished local traffic from interexchange traffic.[56] This is a valid distinction when determining how to compensate carriers for carrying the traffic of other carriers. Indeed, it may properly be used in analyzing the ISP reciprocal compensation issue discussed below. However, the distinction cannot be read as an ultimate limitation on the jurisdiction of the Commission over interconnection between carriers and the compensation to which they are or are not entitled when they exchange traffic. This jurisdiction is federal, and the FCC's authority to deal with the various types of interconnection within that jurisdiction in different manners (especially on a temporary basis) must be analyzed in the context of this broad statutory grant.

Because the Act assigns jurisdiction over intercarrier compensation matters (at least those involving a LEC or a wireless carrier at least one end) directly to the FCC, there is no need for the FCC to take preemptive action. Preemption is not necessary where federal jurisdiction has already been established.[57] However, if necessary, the FCC's preemptive authority can also be utilized to ensure that a valid and viable intercarrier structure is established. As noted above, an interstate-only intercarrier compensation regime is simply impossible, and would tend to aggravate rather than ameliorate the arbitrage problems rampant in the current system. The FCC's authority to preempt state rules that impede the enforcement of valid FCC rules over

[56] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 16012-13 ¶¶ 1033-34 (1996) ("Local Competition Order"). This distinction has, in the area of reciprocal compensation, been recognized as meaningful by the Court of Appeals for the District of Columbia Circuit. *See WorldCom, Inc. v. FCC*, 288 F.3d at 430-31.

[57] *See Boomer v. AT&T Corporation*, 309 F.3d 404, 423-24 (7th Cir. 2002).

traffic, services and facilities within its jurisdiction is well established,[58] even if the state authority is otherwise valid.[59] In this case, the FCC's preemptive authority to adopt rules that preempt intrastate access charges because they are inconsistent with the vital nature of the bill and keep structure that the FCC is adopting would seem to be incontestable.

B. The FCC Has The Duty And The Authority To Ensure That Carriers Whose Revenues Are Reduced Through Adoption Of The Plan Have The Opportunity To Recover Those Revenues From Other Regulated Sources

When the Commission adopts a new ratemaking structure that operates to deprive regulated carriers of the opportunity to earn revenues lawfully due under the earlier rules, the Commission has a statutory and constitutional obligation to allow those carriers the opportunity to recoup those lost revenues from other sources.[60] This does not mean that the FCC stands as a guarantor of the carriers' profitability, or that revenue losses caused by competitive inroads by others are somehow the responsibility of the Commission. It likewise does not mean that the FCC must ensure that a carrier whose revenues come from one source (or from all of its existing sources) has the absolute right to recover those revenues elsewhere (as opposed to having a reasonable opportunity). The law simply provides that a regulator whose actions in adopting a

[58] *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375-76, n.4 (1986); *In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211, Memorandum Opinion and Order, 19 FCC Rcd. 22404, 22414-15 ¶ 19 (2004).

[59] *See Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1332-33 (D.C. Cir. 1989).

[60] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 305, 313, 315 (1989), for a discussion of the constitutional implications of a regulator modifying a ratemaking methodology in a manner that fails to take account of cost and revenue expectations reasonably analyzed under the prior methodology. *See also Brooks-Scanlon Co. v. Railroad Commission of La.*, 251 U.S. 396 (1920).

new regulatory structure may not take or maintain actions that affirmatively impede the ability of affected carriers to recover those revenues from other sources.[61]

In the context of this proceeding, application of this principle is simple. The access revenues that ILECs were reasonably relying on (and which formed part of the FCC's overall ILEC regulatory scheme) will obviously disappear in a bill and keep environment. The FCC has the duty and the authority to modify the regulatory structure elsewhere to enable ILECs to have the opportunity to recover those revenues. The word "opportunity" is critical, because the market may be such that their opportunity does not materialize in its entirety. This opportunity can best be afforded through the permissible subscriber line charge increases described above. If competitive inroads into access lines reduces the revenue available from subscriber line charges in the future, or if carriers seek to prevent access line loss by charging less than the maximum authorized SLC increase, the FCC's duty has been fulfilled.[62]

This, of course, leaves open the jurisdictional issue of how to deal with state regulators who might decline to permit LECs to increase rates to levels that give them the necessary opportunity to recover lost intrastate access revenues. Unlike the matter of intercarrier compensation where the FCC's direct authority is sure, the FCC's jurisdiction over local end-user rates is questionable, at best. Because the lawfulness of the bill and keep structure depends *a priori* on the FCC's having taken the necessary action to ensure revenue neutrality prior to

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[61] *See Duquesne Light Co.*, 488 U.S. at 312, 315. *See also* cases prohibiting "confiscatory ratemaking," whereby a carrier is effectively precluded by regulation from operating profitably. *See, e.g.*, *Federal Power Com'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Com'n*, 262 U.S. 679, 692 (1923).

[62] It should be noted that this analysis applies only to regulated services, and only where the regulator is both implementing a new regulatory scheme and potentially depriving, through regulation, the affected carriers of the opportunity to recoup lost revenues. It has no applicability to deregulated carriers and services, which are examined under a totally different analytical approach.

implementing a bill and keep plan, it is not feasible for the FCC to adopt bill and keep and then wait to see whether or not states take the necessary steps to make the plan lawful. While an argument can be made that the FCC has the authority to direct that state regulators rationalize local rates as part of the FCC's overall obligation to enforce and implement the federal universal service statutory mandate,[63] such a dramatic step seems unnecessary and unwise at this time.

In order to deal with this issue, Qwest recommends that the Commission convene a federal-state joint board under Section 410(a) of the Act and assign it the task of developing a plan to bring the revenues (and costs and investment) associated with intrastate access charges into the federal jurisdiction. This would ensure that the FCC could combine responsibility with authority and deal holistically with the intercarrier compensation problem. Because the FCC has the jurisdiction to treat all aspects of intercarrier compensation at the federal level, it also has the authority to take such further steps as are necessary to make its intercarrier compensation actions lawful. In this case the vehicle of a federal-state joint board seems to be the most appropriate vehicle for accomplishing this result. If the revenues at issue are assigned to the interstate jurisdiction through separations, the difficult jurisdictional issues disappear.[64] The existing universal service joint board has the authority to address separations changes, the CC Docket No. 80-286 separation joint board is still in existence, and the FCC has announced that it will

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[63] For example, the FCC's federal authority to implement the Congressional universal service mandate is extensive. *See Qwest Corporation v. FCC*, 258 F.3d 1191, 1200 (10th Cir. 2001); *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 405-07, 412, 413 (5th Cir. 1999), *cert. granted sub nom. GTE Service Corp. v. FCC*, 530 U.S. 1213 (June 5, 2000), *cert. dismissed*, 531 U.S. 975 (Nov. 2, 2000). Reformation of intercarrier compensation is vital for the preservation of universal service, and Section 254 of the Act can provide a solid basis for federal actions in areas formerly reserved to state authority.

[64] *See National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1113-14 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

conduct a further separations review this summer.[65] Thus the process could be conducted relatively quickly. The advantage of this approach is that it presents dramatically greater administrative simplicity than efforts to achieve rate rationalization through state regulators, and could simply be implemented through an addition to the federal SLC that is part of the bill and keep plan.

C. The FCC Has The Statutory Authority To Adopt A Bill And Keep Regulatory Structure For Intercarrier Compensation

It is appropriate to briefly address the legal authority of the FCC to adopt a bill and keep structure for intercarrier compensation, as several commentors in the past have argued that the Act somehow requires, as a matter of statutory imperative, that the Commission enact a regulatory structure that is based on the CPNP approach. This argument is predicated on the language in Section 252(d)(2)(A) of the Act to the effect that, for purposes of determining compliance by an ILEC with the reciprocal compensation rules applicable to all LECs, the FCC's rules must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier[.] . . "[66] We submit that this language by itself gives the FCC ample opportunity to establish a bill and keep intercarrier compensation regime (subject, of course, to the caveat noted above and reinforced here that carriers must be given the opportunity to recover lost access revenues, interstate and intrastate). The statutory language simply requires that an intercarrier compensation structure permit carriers to recover their costs. A compensation scheme, that, for example, eliminated access charges but did not at the same time permit carriers to recover those lost revenues from their own customers, would

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[65] *See* note 32, *supra*.

[66] 47 U.S.C. § 252(d)(2)(A).

violate this Section of the Act. Shifting the source of such compensation from other carriers to customers is totally consistent with the Act.[67]

Moreover, the FCC was expressly empowered to adopt a bill and keep regulatory structure when it was given the power to elect "arrangements that waive mutual recovery (such as bill-and-keep arrangements)[]" or to adopt a structure such as the current one (based on mutual assessment of terminating charges).[68] What Section 252(d)(2) does preclude is the imposition of a non-cost based scheme or any other scheme that precludes mutual recovery of costs by carriers (a situation that actually has come to pass in many instances as the current structure is manipulated by carriers to their economic advantage).

Qwest does not believe that Section 201 of the Act provides the optimal basis for adoption of a bill and keep intercarrier structure (although it would be lawful for the Commission to rely on Section 201 if it so desired). Intercarrier compensation, along with all other intercarrier interconnection issues (except to the extent states have been delegated authority by the 1996 Act itself) is placed squarely within the federal jurisdiction by Sections 251 and 252 of the Act. The Commission's authority under Section 251(b) and (c) (which is involved here) is greater, vis-à-vis state regulators, than is its authority under Section 201. The only reason to invoke Section 201 in this area would be if Section 251 did not give the Commission sufficient authority to act in a manner most consistent with the public interest. Since this is not the case, Qwest sees no reason to further examine Section 201. Section 251 provides the Commission with all the statutory authority that is necessary.

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[67] In fact, as the ISP "reciprocal compensation" issue demonstrates, it is often not feasible to determine which network is the "originating" network for many calls. In the case of an ISP call, while the call originator is generally the party initiating a call to an ISP, the economic originator (in the sense of being the "cost causer") is the ISP. Under this analysis, the called party's network could be held responsible for the calling party's network costs.

[68] 47 U.S.C. § 252(d)(2)(B)(i).

The point is, the FCC has both the obligation to enact and the power to adopt a comprehensive intercarrier compensation plan that meets the goals of the Act and the requirements of law. Such a regime includes interstate and intrastate intercarrier compensation and a rational structure for recovery of access revenues lost because of the implementation of the new access structure. Bill and keep is not only a permissible approach to intercarrier compensation, it is expressly recognized in Section 252 of the Act as a permissible regulatory approach.

D. The Commission Should Forbear From Enforcement Of The Bulk Of The Rate Integration And Rate Averaging Rules, Leaving Them In Place Only For The Purpose For Which They Were Actually Intended

In the Further Notice, the FCC asks whether some or all of the existing rate integration and rate averaging rules should be modified or eliminated.[69] Qwest agrees that the existing rate averaging and rate integration rules go far beyond the intention of the statute enacting rate averaging and rate integration, and are currently anti-competitive, uneconomical and counterproductive. The FCC should, pursuant to its forbearance authority in Section 10 of the Act, eliminate all rate integration and rate averaging rules except as applied to Alaska and overseas U.S. states, territories and possessions.

The rate integration rules, which prohibit an IXC from discriminating against its subscribers in different states,[70] were derived from the FCC's old rate integration rules that had prohibited AT&T from including Hawaii and Alaska in its international, rather than its domestic, rate schedule.[71] When codified, the new law, even though clearly intended to simply continue

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[69] Further Notice ¶ 86.

[70] 47 U.S.C. § 254 (g); 47 C.F.R. § 64.1801(b).

[71] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564, 9568-69 ¶ 9 (1996).

the pre-existing policies,[72] was written so that it applied to all states, and the Commission (again based on statutory intent) extended it to all overseas U.S. possessions.[73] The Commission has extended the rule to include special access (including application to both terminating and originating locations).[74] Thus, under the current rule, an IXC offering a special promotional bonus offer in Mississippi is at legal risk unless it offers the same bonus opportunity in New York (if it also offers service in New York). As best as can be determined, the rate integration rules do not apply to contract tariffs or contract services, except that a carrier cannot offer to enter into contracts with customers in one state without similarly offering to enter into contracts with customers in all other states in which it does business. The Commission generally precludes long distance carriers from charging customers who utilize the services of a LEC with high access charges more than they charge customers using a LEC with low access charges, although it is not entirely clear whether this particular prohibition is derived from the rate integration or the rate averaging sections of the Act.[75] In the case of special access loops which can be charged by LECs directly to end-user customers, rate integration would not appear to require that IXCs assume control over special access prices and IXCs may charge prices which include the special access loop price on an individual basis. Given the fact that the economic milieu in which the rate integration rules operate is the highly competitive long distance market, it is clear that the rate integration rules cannot be sustained. They serve no rational purpose, and actually depress both the ability of carriers to offer attractive services in an economical manner and the incentive of carriers to serve some states altogether. There is absolutely no indication

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[72] *Id.*

[73] *Id.* at 9566-67 ¶ 5.

[74] *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Memorandum Opinion and Order, 19 FCC Rcd 6746 6748-49 ¶ 7 (2004).

[75] Further Notice ¶ 85.

that there ever was a problem requiring rate integration rules within the 48 continental states. The requirements for forbearance elucidated in Section 10(a) of the Act are clearly met by virtue of the intense competitive market forces in the long distance market place.[76] There is simply no conceivable need for continuance of these rules.

The one area where immediate action on rate integration would not be wise is those areas to which rate integration was initially addressed in the first place: Hawaii, Alaska, and U.S. off-shore territories and possessions. While it is not completely clear that these rules in their current form are still necessary in these areas, Qwest agrees that it would be premature to modify them without a full record. Thus, Qwest recommends that the FCC act immediately to forbear from all enforcement of the rate integration rules for the continental forty-eight states.

The rate averaging rules are not state specific, but instead require that providers of interexchange service (interstate or intrastate) average their rates in such a fashion that rates charged to subscribers in high cost areas are not greater than the rates charged to other subscribers. Because these rules do not apply to special access services, and because there are other limitations on their scope that ameliorate some of the harsher anti-competitive effects of the rate integration rules, these rules are not as disruptive as the rate integration rules. However, one aspect of the rate averaging rules should be eliminated immediately. The Commission should make clear that IXCs can pass through exchange access charges to subscribers in all instances. The current rules, which allow a LEC to charge high exchange access rates to carriers without having their customers feel the effects of those charges, make no sense.[77] The

[76] 47 U.S.C. § 160(b).

[77] CLEC interstate access charges are limited by FCC rule. *In the Matter of Access Charge Reform*, CC Docket No. 96-262, 16 FCC Rcd 9923, 9941-46 ¶¶ 45-53 (2001). Independent ILEC interstate access charges are often much higher, and intrastate access charges of all LECs can be gigantic.

Commission should also commence a rulemaking to determine whether the rate averaging rules are productive in other respects, but, in the absence of such a proceeding, there is no reason to further modify the rate averaging rule.

IV. QWEST'S PLAN WOULD RESOLVE NUMEROUS SIGNIFICANT LEGAL AND POLICY ISSUES IMPLICATED BY OTHER INTERCARRIER COMPENSATION REFORM APPROACHES

A. The Qwest Plan Allocates Responsibility For Transiting In An Efficient Manner That Is Consistent With Carrier Obligations Set Forth In The Act

The Qwest plan for transiting, discussed below, is the approach required by the Act and is most consistent with the important policy goals set forth in the Further Notice. The Commission should clarify that this is the correct treatment of transiting traffic regardless of what it does in terms of a unified intercarrier compensation reform.

1. Qwest's Plan Allocates Financial Responsibility in a Manner that Allows for a Market-Oriented Approach to Carrier Interconnection on Both Sides of A Carrier's Network Edge

As described more fully above in Section II.A.1, Qwest's plan would identify the edge of a carrier's network as the relevant point for purposes of dividing financial responsibility between interconnecting carriers. In short, the originating carrier is responsible for paying for the costs of facilities transporting traffic from its network to another carrier's edge and will recover those costs from its own subscribers. The terminating carrier will recover from its subscribers the costs of transporting traffic from the edge to its subscriber's premises (*e.g.*, access tandem switching, transport to the local switch, local switching and the local loop). With few exceptions,[78] the details of transport arrangements for traffic will be accomplished by carrier negotiation.

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[78] Under Qwest's plan, industry-accepted engineering standards will be used to size transport, direct and overflow trunk groups, with the provisioning of trunks at a higher service level a cost

By establishing a default financial POI (the edge), the Qwest's plan is the method most likely to lead to the creation of efficient and desirable types of interconnection. Indeed, the most efficient and desirable type of interconnection is the deployment of two-way trunks between the respective networks wherever justified by traffic volumes. Under Qwest's plan, no additional regulation beyond the definition of default financial dividing lines or edges should be needed to accomplish this result. Each carrier has a foundational obligation to interconnect as set forth in Sections 201(a) and 251(a)(1) which would be implemented by the rules adopted in this proceeding. Because the edge for traffic going to carrier A from carrier B may not be the same as the edge for traffic going from carrier B to carrier A, the default result for interconnection between carriers exchanging traffic could be the required construction of separate one-way trunks. Given the increasingly competitive nature of the industry, it would be counter to the economic interests of any carrier to insist upon artificial network inefficiencies in its own network. Carriers would therefore have a strong incentive to share the costs of a single two-way trunk whenever some traffic flows in each direction between the two carriers.[79]

The Qwest plan employs this same market-oriented approach to transiting. Under Qwest's plan, in the transiting context, the intermediate carrier or transit service provider must be

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borne by the carrier requesting the additional trunks. Where traffic volumes justify direct trunk groups to a particular local switch, the interconnecting carrier must segregate such traffic into its own trunk group for interconnection at the local carrier's access tandem location and routing directly to the local switch. Overflow trunks between local switches and their access tandem cannot be segregated between an ILEC's affiliate IXC and its competitors. Subscriber pricing by ILECs for toll access service may not be presubscribed IXC specific.

[79] In any event, the designation of the edge as the financial POI should incent carriers to negotiate adequate intercarrier interconnection in most circumstances without further regulation. A more interventionist approach could be formulated with detailed, nationally uniform regulations comprehensively establishing how carriers must interconnect in specific circumstances, when two-way trunks should be required, how routing should be determined, etc. Indeed, the ICF has crafted just such a more interventionist regulatory scheme. If such a scheme is to be employed, the ICF proposal is, for the most part, acceptable to Qwest.

compensated by the originating carrier and an agreement for payment for transiting services - with pricing determined by the market - must be reached before the service is provided. This approach is, in fact, not only the most sound approach to transiting, but, as described more fully below, is the approach required by the Act and is most consistent with the important policy goals set forth in the Further Notice. This approach is also most consistent with the central premise underlying bill and keep at the edge -- that premise is that, when two carriers exchange traffic, each carrier bears total responsibility for the costs incurred in processing any given call on its side of the network edge and recovers those costs from its own end user involved in the call. In that way, each carrier is induced to employ efficient technology on its side of the network edge and all the myriad advantages of the bill and keep at the edge plan described above come into play. The carrier choosing to employ the services of a transit service provider to reach the edge of another carrier network must pay the negotiated price for that service. In the context of three-carrier calls where the intermediate carrier has no contractual relationship with the calling end user (*i.e.*, a call utilizing transiting),[80] the sensible bill and keep approach is to treat this effectively as a *two-carrier* call and thereby require the originating carrier to ensure transport -- through one means or another -- to some point of interconnection with the terminating carrier.

Under Qwest's plan, in a case where the originating carrier utilizes a transit service provider for transport from its network to the edge of the terminating carrier, the transit service

[80] This type of three-carrier call is to be distinguished from the other type of three-carrier calls, those in which the end user has an independent relationship with the intermediate carrier (such as an IXC). Where the end user does have a relationship with the intermediate carrier (*e.g.*, a customer/IXC relationship), the sole obligation of the originating carrier under bill and keep at the edge is to transport the call to a point of interconnection with that intermediate carrier, which must terminate the call to a third carrier and recover its own transport costs from the end user. This scenario is thus wholly distinguishable from the type of three-carrier scenario discussed in the text -- transiting -- in which the end user lacks a relationship with the intermediate carrier. A transiting LEC typically provides transporting functions for the originating carrier without an opportunity to recover the costs of those functions from any relevant end user.

provider will charge due compensation to the carrier originating the traffic for all costs of transit to either an IXC's or terminating carrier's edge and the originating carrier will recover such costs from its own subscribers.[81] As is the case with other situations where the edge of two carriers is not adjacent, the originating and terminating carrier will have an incentive to cooperate and jointly retain a transiting carrier. It should be kept in mind that, in the transiting context, the originating carrier always has the ability to directly connect to the terminating carrier instead of using a transit carrier. However, if the originating carrier chooses to use the services of a transit service provider, it must of course pay for those services.[82]

2. Qwest's Transiting Proposal Is The Regulatory Treatment Required By The Act And Is Consistent With Both Prior Commission Legal Precedent And The Important Policy Goals Set Forth In The Further Notice

a. Transiting is an Interconnection Matter Subject to Sections 201 and 202 of the Act

As the Commission notes in the Further Notice,[83] certain CLECs and CMRS carriers have argued, historically, that Sections 251(a)(1)(requiring telecommunications carriers to "'interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers'") and 251(c)(2)(B)(requiring ILECs to provide interconnection "'at any technically feasible point within the carrier's network'") of the Act create a carrier obligation to provide transiting. These arguments ring hollow. Transiting is an interconnection service subject to Sections 201 and 202 of the Act, and is not subject to the rules related to common

[81] These same principles should govern the regulatory treatment of signaling, with signaling providers able to charge the carrier originating the traffic market rates for the signaling provided in order to accomplish transport or transiting to either an IXC's or a terminating carrier's edge and the originating carrier will recover such costs from its own subscribers.

[82] In a situation where today two LECs provide jointly provided switched access, the new rules would treat one of the LECs as a transiting provider.

[83] *See* Further Notice ¶ 127, n.363.

carrier services offered to the public and interconnection under these circumstances can only be ordered after notice and a hearing as required under Section 201(a) of the Act.[84] While there might be instances where a carrier could compel transiting interconnection under the Act, those circumstances will be very limited. Certainly the record does not support a general rule on transiting requiring that it be provided on a universal basis at regulated rates.

No other provision of the Act imposes an obligation upon carriers to provide transiting services between two other carriers. Section 251(a), on its face deals only with physical connections and imposes no such duty on carriers.[85] Similarly, Section 251(c)(2) plainly only speaks to the ILEC duty to provide interconnection with *the ILEC's* network. Neither of these provisions can reasonably be read to obligate an ILEC or any other carrier to provide transiting between the networks of two other carriers. Indeed, as the Commission acknowledges in the Further Notice, "[t]he Commission's rules define the term 'interconnection' to mean 'the linking of two networks for the mutual exchange of traffic' and not 'the transport and termination of traffic.'"[86] As the Commission also acknowledges in the Further Notice, interpreting Section 251(a) to require transiting might be read to suggest that, if two carriers choose to meet their obligations under Section 251(a) by interconnecting directly, each might arguably be required to pass traffic to other carriers through that direct connection -- an obviously absurd result.

At bottom, a carrier obligation to provide transiting can only be founded upon the requirements of Section 201 and 202 of the Act that common carriers provide interconnection with other carriers under the circumstances described in Section 201. Contracts or tariffs for

[84] *See AT&T Corporation v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002).

[85] *See AT&T v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

[86] Further Notice ¶ 128 (citing 47 C.F.R. § 51.5).

such interconnection must avoid "any unjust or unreasonable discrimination in charges…"[87] In other words, the Commission should allow the market to establish transiting rates and those rates should be deemed reasonable absent a showing to the contrary on a case-by-case basis.[88] Intercarrier contracts subject to filing under Section 211(a) are the optimal means for establishing transiting relationships.

b. The Act does not Require or Permit Non-Market Based Transiting Compensation Rates

Nor is there any basis for the argument that, if transiting is required, TELRIC or some other non-market-based pricing methodology should be used to establish regulated rates for transiting. To begin with, there is no basis whatsoever under the Act for an argument that TELRIC pricing should be applied to transiting services. Even if Section 201(a) or Section 251(a) could be read to impose an obligation on carriers to provide transiting services, the Act would not call for TELRIC pricing to be mandated for such services. Section 252(d)(1), out of which TELRIC arises, is expressly limited to Section 251(c)(2) interconnection and Section 251(c)(3) unbundled network elements and would not apply to a transit service obligation

[87] 47 U.S.C. §§ 201, 202.

[88] As in the case of carrier interconnection and transport on the terminating carrier side of the edge, described above, a more interventionist regulatory scheme can be crafted for transiting pricing. Indeed, as in that context, the ICF has proposed such a rate scheme for transiting. However, in the transiting context, Qwest encourages the Commission to begin with a market-oriented approach based merely on the designation of the edge as the default financial POI and the express imposition on the originating carrier of the obligation to compensate the transit service provider where an originating carrier utilizes a transit service provider to transport traffic from its network to the edge of the terminating carrier -- before employing a detailed regulatory scheme. Such an approach will maximize the incentives for carriers to negotiate efficient arrangements and, where appropriate, construct new facilities. The Commission can always, at a later date, implement a more targeted, interventionist approach -- *i.e.*, only where necessary and only after further study. If, in the end, such a scheme is to be employed, the ICF proposal is, for the most part, acceptable to Qwest.

outside of those sections. Moreover, the law is clear that TELRIC is non-confiscatory in only very limited circumstances.[89]

No matter how this docket is ultimately resolved, the Commission should not apply reciprocal compensation to transiting services (*i.e.*, permit a terminating carrier to bill a transiting carrier). The plain language of Section 252(d)(2)(A) (requiring that reciprocal compensation pursuant to Section 251(b)(5) be priced based on "the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier") makes clear that reciprocal compensation does not apply to transiting costs.[90] In the transiting context, where the transit provider is an intermediate carrier lacking a relationship with an end user involved in the traffic at issue, there simply is no issue of reciprocal compensation.

Finally, certain carriers argue that, if reciprocal compensation does not apply to transiting traffic, access charges must apply.[91] Even if access charges remain in any new compensation structure, there is no basis for such an argument in the language of the Act and such a novel approach to transiting would be difficult to square with either Section 251(b)(5) or 252(d)(2). Moreover, to require transit service providers to pay access charges would be an absurdly unfair result. IXCs pay access charges to LECs when they use LEC networks to either originate or terminate calls placed by the IXC's end-user customer. IXCs then recover the costs for those access charges in the rates they charge to their end-user customers. Transit service providers accomplish the transport of traffic between carriers. They are not providing a service to an end

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[89] *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 528 n.39 (2002: *see also* Local Competition Order, 11 FCC Rcd at 15872 ¶ 739.

[90] As is discussed below, the FCC has actually decided this issue.

[91] *See* Further Notice ¶ 132.

user and, in fact, have no end-user customer involved in the traffic they transit from whom they can recover the costs of access charges that they may be charged. They are entitled to fair, market-determined compensation from the originating carrier for the transiting service that they provide.

c. Immediate Clarification of Transiting Obligations in a Manner Consistent with Commission Rules and the Policy Goals of the Further Notice is Vital

Again, Qwest's proposal for the treatment of transiting traffic is to require originating carriers to pay the transit service provider market-based compensation for transiting services. Regardless of what intercarrier compensation reform is ultimately adopted, the Commission should immediately clarify that this approach is the approach required by both the relevant prior rulings of the Commission and the important policy goals set forth in the Further Notice.

The Commission's prior rulings support Qwest's proposal. The FCC addressed transiting in the *Texcom Order*. In that case, intraMTA calls, that originated on the networks of third-party carriers, transited the network of GTE North ("GTE") and terminated on the network of Answer Indiana, a CMRS provider. Answer Indiana filed a formal complaint with the Commission challenging GTE's attempt to charge it for the delivery of that traffic. In denying Answer Indiana's complaint, the Commission stated:

> Currently, our rules in this area follow the cost causation principle of allocating the cost of delivering traffic to the carriers responsible for the traffic, and ultimately their customers. Thus, through reciprocal compensation payments, the cost of delivering LEC-originated traffic is borne by the person responsible for those calls, the LEC's customers. As we stated in the *Local Competition Order*, "[t]he local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call"… In the case of third-party originated traffic, however, the only relationship between the [transiting carrier's] customers and the call is the fact that the call traverses the [transiting carrier's] network on its way to the terminating carrier. Where the LEC's customers do not generate the traffic at issue, those customers should not bear the cost of delivering that traffic from a CLEC's network to that of a CMRS

> carrier like Answer Indiana. Thus, the originating third-party carrier's customers pay for the cost of delivering their calls to the LEC, while the terminating CMRS carrier's customers pay for the cost of transporting that traffic from the LEC's network to their network.[92]

On reconsideration, the FCC, in *Texcom*, also noted that "carriers are free to negotiate different arrangements for the costs associated with indirect interconnection."[93]

The FCC's Wireline Competition Bureau (the "Bureau") addressed a similar issue in the *FCC Virginia Arbitration Order*, issued during an FCC arbitration of interconnection agreements between AT&T and Verizon in lieu of the Virginia commission.[94] In that case, AT&T contended that Verizon should treat transiting traffic from third-party carriers to AT&T as Verizon's own traffic. However, the Commission ruled that "when a third-party LEC places a call that terminates to [an AT&T customer], AT&T must bill the third-party LEC directly."[95] While these decisions dealt directly with the liability of the third-party carrier (transit service provider) for access charges billed by the terminating carrier in a transiting context, both decisions make clear that the originating carrier is responsible for transiting costs <u>and</u> that carriers should be free to negotiate market-based arrangements for transiting. In the decision, the Bureau acknowledged, with respect to whether or not carriers had an obligation to provide transiting, that there is no "clear Commission precedent or rules declaring such a duty."[96] Finally, the Bureau also

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[92] *Texcom, Inc. v. Bell Atlantic Corp.*, File No. EB-00-MD-14, Memorandum Opinion and Order, 16 FCC Rcd 21493, 21495 ¶ 6 (citations omitted).

[93] *Texcom, Inc. v. Bell Atlantic Corp.*, Order on Reconsideration, 17 FCC Rcd 6275 6277 n.12 (citation omitted).

[94] *In the Matter of Petition of WorldCom, Inc., et al., Regarding Interconnection Disputes with Verizon Virginia*, CC Docket No. 00-218, Memorandum Opinion and Order, 17 FCC Rcd 27039 (2002)

[95] *Id.* at 27305 ¶ 544 (footnote omitted).

[96] *Id.* at 27101 ¶ 117; *see also In the Matter of Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*

concluded in that case that “any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC” and the Bureau expressly approved Verizon’s charging of non-TELRIC rates for transiting.[97]

Qwest’s transiting proposal also best furthers the policy goals set forth in the Further Notice. In the Further Notice, the Commission recognizes “the importance of identifying and implementing appropriate interconnection incentives for the future.”[98] The Commission expressly seeks comment “on the possibility that mandated transiting or regulated rates for such service might discourage the development of this market.”[99] Moreover, the Commission acknowledges that “if a transit service obligation is imposed, indirectly interconnected carriers may lack the incentive to establish direct connections even if traffic levels warrant it.”[100] These concerns, of course, dovetail with the overall goals of intercarrier compensation reform expressed elsewhere in the Further Notice. The central goals to reform should be to promote

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and for Arbitration, WC Docket No. 02-359, 18 FCC Rcd 25887, 25908-09 ¶ 38 (“*Cavalier Order*”), (Wireline Bureau found there was no FCC precedent or rule holding that Verizon has a duty to provide transiting under the Act and expressly declined to create such a ruling under its delegated authority); *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota*, WC Docket No. 03-11, 18 FCC Rcd 7325, 7376 n. 305 (2003) (*New Mexico, Oregon and South Dakota 271 Order*”) (“Although we do not address the merits of AT&T’s assertion that Commission rules require Qwest to provide transit service under section 251(c)(2), we note that the Commission has not had occasion to determine whether incumbent LECs have such a duty, and we find no clear Commission precedent or rules declaring such a duty.”).

[97] FCC Virginia Arbitration Order, 17 FCC Rcd at 27100 ¶ 115, 27101 ¶ 117 (approving non-TELRIC rates and stating “we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates… any duty Verizon may have under section 251(a)(1) of the Act to provide transit service would not require that service to be priced at TELRIC.”) (footnote omitted).

[98] Further Notice ¶ 129.

[99] *Id*.

[100] *Id*. ¶ 131 (citation omitted).

economic efficiency and to promote facilities-based competition in the marketplace.[101] As described more fully above, Qwest's plan for transiting best serves those goals.[102] While transiting services generally are provided by large ILECs today, Qwest believes there is a niche market for other carriers to provide such transport particularly under Qwest's bill and keep at the edge proposal. Traffic aggregators such as Syringa Networks in Idaho and INS in Iowa and LECs such as Onvoy, Verizon and Sprint already provide transit services within Qwest's region. In addition, there are many more carriers that operate tandems which provide access services to IXCs that would develop into a transit relationship upon implementation of Qwest's bill and keep plan. Qwest has also, in some instances, already lost transiting customers to other tandem service providers such as Syringa Networks and Onvoy.

d. Transiting is an Interconnection Function Subject to the FCC's Jurisdiction

Any rule that the Commission established for transiting should apply both to interstate transiting and intrastate transiting. As discussed above, the provision of transiting is an

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[101] *Id*. ¶ 31.

[102] With respect to the Commission's request for comment as to whether or not the billing information, in the transiting context, is adequate to determine the appropriate intercarrier compensation due, *see* Further Notice ¶ 133, Qwest believes that the billing information currently available in the transiting context is adequate. Qwest specifically opposes any attempt to impose obligations on the transiting carrier to provide specific billing information in the transiting context. Again, the information currently available is adequate and, as the Bureau expressly found in the FCC Virginia Arbitration Order, 17 FCC Rcd at 27102 ¶ 119, Regional Bell Operating Companies ("RBOCs") are not required to serve as billing intermediaries between carriers who terminate traffic to another carrier by using RBOC transit services. The originating carrier should be responsible for providing billing records to both the transit provider and the terminating carrier. Qwest does offer transit records, when available, for a fee to the terminating carrier so they can bill the originating carrier for the call. Upon adoption of Qwest's plan, this matter will be moot except in those instances where a termination charge is permitted. Also, under bill and keep there is no opportunity for the terminating carrier to bill the originating carrier for the transit traffic so there is no need for the transit provider to send a transit record to the terminating carrier.

interconnection function subject to FCC jurisdiction. Moreover, this is appropriate given that it is practically impossible to distinguish intrastate and interstate transiting traffic.

B. The Commission Must Address The Problem Of VNXX, Regardless Of What Plan Is Adopted For Intercarrier Compensation

Regardless of what the Commission does with respect to intercarrier compensation, it must clarify the correct regulatory treatment of VNXX traffic. Should the Commission adopt, as Qwest advocates, a bill and keep plan, the issue of VNXX effectively disappears as an intercarrier compensation issue -- at least, once bill and keep becomes fully effective. However, even if bill and keep is adopted, the Commission still must clarify immediately that VNXX traffic is properly treated as interexchange traffic in order that it may be treated properly during any transition plan.

1. The Commission should reiterate that VNXX traffic is interexchange traffic, not local traffic.

a. VNXX Defined

VNXX describes a situation where a call originating in one local calling area, using a dialed local number, is routed to another LEC which terminates to an end user physically located in another local calling area. In other words, it is a toll call (often considered to be a foreign exchange or FX call). However, a number of CLECs claim that a call is local if the two numbers are local, regardless of where the called party is located. This is simply not an accurate assessment of the applicable rule. VNXX actually encompasses two different types of interexchange traffic. In the first situation, intraLATA VNXX, both the calling party and the called party are within the same LATA but are in different local calling areas. In the second situation, interLATA VNXX, the called party is located in a distant LATA, often in a different state. In either case, CLECs accomplish VNXX by obtaining local NPA-NXXs and filing them in the Local Exchange Routing Guide ("LERG") associated with the originating end-user's rate center despite the fact that the end user associated with the NPA-NXX is connected via dedicated facilities to another location and not physically located in the same local calling area. In this way, CLECs effectively demand treatment of intraLATA or interLATA interexchange toll calls as local for purposes of determining the proper intercarrier compensation. Very often, CLECs use VNXX to service remote ISP POPs. However, VNXX is regularly used for non-ISP traffic as well. Regardless of the particular type of traffic involved, CLECs use VNXX precisely so that they might both avoid access charges (which apply to the interexchange use of ILEC local exchange networks) <u>and</u> collect unwarranted "reciprocal compensation" payments. This is a most serious problem when the "end user" is an ISP with a POP in a remote state or LATA. Yet, even in that circumstance, a CLEC might claim the right to receive reciprocal compensation as if the ISP POP were located locally.

b. VNXX Traffic is Interexchange Traffic Based Upon the Location of the End Points of a Call, Not the Numbers Assigned by CLECs

Both interLATA and intraLATA VNXX calls are properly classified as interexchange calls subject to access charges under the current regulatory structure. The Commission's existing rules base the determination of whether a given call is local or interexchange upon the end points of the call. Those rules demand the result that traffic which originates and terminates in different calling areas is interexchange traffic. CLECs claim that calls to a "local" NPA-NXX should be treated as local for purposes of determining whether access charges should be billed to the IXC, regardless of the actual physical locations of the called and calling parties. These arguments are directly contrary to the law. Calls between two end points in different local calling areas are not local, no matter what numbers are assigned to those end points. Existing rules should be clarified and adequately enforced as necessary to ensure that compensation is not being claimed or received based on a claim that a long distance call is really local because of the assigned telephone number.

Even when this VNXX traffic is Internet-bound traffic, the Commission's rules make clear that it is interexchange traffic when the ISP POP is located in a distant local calling area. The proper application of the ESP exemption recognizes (indeed requires recognition) that VNXX traffic is interexchange traffic. A number of CLECs appear to claim that the ESP exemption permits them to charge reciprocal compensation and avoid access charges for VNXX calls that are delivered to an ISP POP even when calls to other similarly located end-user premises would result in payment of access or toll charges (*e.g.*, when an ISP POP is in a remote local calling area, LATA or state). This is predicated on a misunderstanding of the ESP exemption. The ESP exemption permits enhanced service providers ("ESPs") to purchase access at local rates when they use ILEC local exchange switching facilities to originate and/or terminate interstate traffic but only when the ESP is physically located within the local calling area of a party either calling to or called from the ESP. Accordingly, the ESP exemption simply has no application to VNXX traffic. Where a call originates in one local calling area and terminates to an end user physically located in another local calling area, the call is not a local call even when the called party is an ISP/ESP.

Nor does the temporary compensation regime established by the *ISP Remand Order* change this conclusion that VNXX traffic is interexchange traffic. The findings of the *ISP Remand Order* and the decision of the United States Circuit Court of Appeals for the District of Columbia in reviewing that decision, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), were expressly confined to the limited circumstances addressed therein -- *i.e.*, the treatment of traffic where both the calling party and the ISP end user (the ISP POP) were physically located in the same local calling area. By definition, VNXX, where a call originates in one local calling area and terminates to an end user (including an ISP POP) physically located in another local calling area, does not occur in these circumstances. In other words, the *ISP Remand Order* established rules that apply to situations where the ISP receives local traffic at its POP and delivers that traffic to the Internet or other interstate locations. If the traffic is not local when it arrives at the ISP POP (*e.g.*, when the ISP POP is remotely located in another local calling area), the normal ESP exemption rules apply and access must be paid by the IXC[103] because the call to the ISP POP is a long distance call. In those circumstances the call is treated as a long distance call and the originating LEC is entitled to access charges for its services, and need not pay reciprocal compensation.

Any argument that VNXX should not be subject to access charges based upon the historic treatment of ILEC Foreign Exchange ("FX") services also fails to hold water. Certain CLECs have argued that intraLATA VNXX service should be treated (for access and reciprocal compensation purposes) as analogous to intraLATA FX service provided by an ILEC.[104] ILEC FX services are intraLATA services by which ILECs have permitted customers physically located in one local calling area to receive traffic originating in another local calling area by purchasing a private line transport service. ILECs historically have not been charging themselves access charges when they provide intraLATA FX services.[105] Certain CLECs argue that this treatment of intraLATA FX service mandates that intraLATA VNXX traffic be

[103] In many cases, the CLEC and the IXC will be identical. In such an event, the CLEC/IXC pays the originating LEC for the access functions it has performed. *See*, *e.g.*, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001).

[104] It is notable that this argument has no application whatsoever to interLATA VNXX, as access charges have historically been applied to interLATA FX service.

[105] ILECs recover those costs through private line charges to their FX customers.

permitted to be classified as a local call. Qwest agrees that the access charge treatment of intraLATA FX and VNXX services should ultimately be the same because the determinative analysis of end-user location produces the same result in each of these distinct contexts. Qwest also supports efforts to achieve parity in state regulatory proceedings for these two services. However, this conclusion does not change the fact that intraLATA VNXX is properly classified as interexchange traffic subject to access charges on the same basis as all other non-local calls.

Nor does the Commission's ruling in *Starpower Communications, LLC v. Verizon South, Inc*., 18 FCC Rcd 23625 (2003) ("*Starpower*") change this result. In *Starpower*, the state had relinquished jurisdiction under Section 251(e)(5) of the Act to resolve a dispute arising under an interconnection agreement regarding whether or not Verizon was obligated under the interconnection agreement to pay reciprocal compensation for VNXX traffic. In ruling that Verizon was so obligated, the Commission relied, among other things, upon the fact that Verizon had rated the relevant calls local for purposes of billing to its own originating end users and the fact that Verizon also treated as "local" calls made to its own intraLATA FX customers. In the end, the Commission found that Verizon had offered "no persuasive evidence that, at the time the parties entered into the [interconnection agreement], they intended that a customer's physical location rather than number assignment would dictate compensation obligations under the Agreement."[106] However, the Commission resolution of the issue of the correct interpretation of the particular interconnection agreement at issue in that case has no precedential value with regard to the issue of how such traffic should be treated under the Commission's rules, generally,

[106] *Starpower*, 18 FCC Rcd at 23632-33 ¶ 16.

and outside of the context of an interpretation issue brought before the Commission under Section 252(e)(5).[107]

2. Under Qwest's Plan, the Problems Associated with VNXX Disappear

If bill and keep is not adopted by the Commission, the Commission must clarify that VNXX traffic is properly treated as interexchange traffic[108] in order to end the ongoing disputes and other problems associated with intercarrier compensation for VNXX traffic. If bill and keep is adopted, the problems described above associated with disputes regarding the proper regulatory treatment of VNXX traffic go away because, under any true bill and keep regime, the distinctions between the treatment of local and interexchange traffic for purposes of intercarrier compensation go away. For example, under Qwest's plan, once the traffic is handed-off at the relevant edge, the terminating carrier becomes responsible for completing the call and neither carrier is entitled to compensation from the other. However, should the Commission adopt Qwest's bill and keep at the edge plan, or any other true bill and keep regime for that matter, the Commission still must clarify the correct regulatory treatment of this traffic in order to permit proper treatment of VNXX traffic during the transition time while the new structure is being implemented.

[107] For this same reason, the FCC Virginia Arbitration Order, reflecting another 252(e)(5) arbitration decision in which the Commission found that Verizon had given the CLEC "no viable alternative to the current system" of VNXX compensation, is inapplicable to this issue as well. 17 FCC Rcd at 27181 ¶ 301. The Commission was choosing between contract interpretations, not examining how its rules function.

[108] Again, this is true whether the traffic is ISP-bound or not.

C. The Commission Must Address The Existing Problems Associated With CMRS Traffic, Regardless Of What Plan Is Adopted For Intercarrier Compensation

1. The Current Regulatory Treatment of CMRS Traffic Creates Rate Disparity and Arbitrage Opportunities, Primarily Because of the Disparities in Local Calling Areas

Vastly different billing practices and intercarrier compensation rules apply to ILEC and CMRS calls. Such differences are rooted in anomalies growing out of the initial Local Competition proceeding, rather than logic. For ILECs, classification of a call as "local" or "toll" generally depends on whether the call remains in a single local calling area or is carried between two different calling areas. These local calling areas are subject to oversight by state regulators. Calls originating and terminating within the same rate center, or within a cluster of rate centers comprising a local calling area, are billed as local calls. Calls between rate centers in different calling areas are typically rated and billed as toll calls. If a call terminates on the network of another wireline provider, whether LEC or IXC, the Commission's intercarrier compensation rules follow the same local calling area conventions to determine whether the call is subject to reciprocal compensation or access charges.

Different practices and rules apply to calls involving CMRS providers, both in terms of end-user charges and intercarrier compensation payments. CMRS providers generally do not rely on rate centers to establish the geographic boundary between local and toll calls. For example, CMRS providers generally have local calling areas covering an entire Major Trading Area ("MTA"), as compared to the much smaller ILEC local calling areas. The much larger CMRS local calling areas are established by federal law.[109] Many CMRS providers offer flat-rate plans that do not distinguish between local and long distance calls for end-user billing purposes. For purposes of intercarrier compensation, a call originated or terminated by a CMRS provider is

[109] *See* Local Competition Order, 11 FCC Rcd at 16014 ¶ 1036.

considered local, and therefore subject to reciprocal compensation charges rather than access charges, as long as the call stays within the same MTA, unless the call is carried by an IXC, in which case access charges apply if the IXC hands the call off to a LEC.[110] This is known as the "intra-MTA" rule. Of course, an ILEC may assess toll charges on its own end-user customers for "one plus" calls in the same circumstances it would for any other call, but an ILEC delivering or receiving an intra-MTA call to or from a CMRS provider within an MTA must treat the call as local.

A call to or from a wireless end user may be subject to different intercarrier compensation charges based solely on whether the call is carried by a LEC or an IXC. Moreover, the same call may be treated as a local call for purposes of intercarrier compensation and a toll call with regard to wireline end-user charges. Inevitably, these arbitrary distinctions create incentives for arbitrage. For example, by handing off an intra-MTA call destined for a wireless end user to an IXC,[111] an originating ILEC may be able to both avoid the duty to pay reciprocal compensation to the CMRS provider for what should have been a local call, and also collect access charges from the IXC that carries the call. On the other end of such calls, CMRS providers and IXCs continue to fight over the appropriateness of CMRS access charges.[112] Still other arbitrage problems are created by the fact that certain CMRS carriers are set up to receive only one-way traffic -- *i.e.*, paging carriers.

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[110] TSR Order, 15 FCC Rcd 11166, 11184-85 ¶ 31 (2000).

[111] This situation often occurs when an independent LEC is involved. The independent LEC customer dials a 1+ number. If Qwest is the designated toll carrier for the call, it receives the call and pays access at both ends of the call. On the other hand, a call from a CMRS customers to the same independent LEC end user is treated as a local call subject to reciprocal compensation.

[112] *See AT&T v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

Additionally, the intra-MTA rule imposes exorbitant transport costs upon ILECs which they, in turn, have no opportunity to recover under the current compensation rules. These transport costs arise from the combined impact of the disparities that exist between the geographical scope of the wireline local calling areas and that of the wireless MTA and the fact that CMRS providers need only have a single point of interconnection (SPOI) in each MTA. As a result, uncompensated transport is imposed on ILECs on wireline-CMRS traffic both when that traffic is originated by a CMRS provider and when it is originated by a wireline provider. For example, consider the state of Montana in which the entire state is a single MTA. If Qwest originates a call in the eastern-most portion of the state and the terminating CMRS provider's SPOI is located in the western-most portion of the state, Qwest must transport the call a considerable distance to that SPOI and then pay the CMRS provider to terminate that call. For traffic going the other way between those same two callers, Qwest is also penalized. The CMRS provider originates the call and hands it off to Qwest at the CMRS provider's nearby SPOI and Qwest must transport that call across the state without any compensation for that transport function.

2. Under Qwest's Plan, the Problems Associated with CMRS Traffic Disappear

Adoption of Qwest's bill and keep at the edge plan would resolve many of these issues relating to LEC-CMRS traffic. While the disparities described above do exist and have evolved over time, the Commission long ago made clear that CMRS providers are telecommunications carriers for purposes of the compensation rules created by the Act.[113] They are also providers of local exchange service and exchange access service, even though they are not LECs. Accordingly, CMRS providers would receive the same treatment as other carriers under Qwest's

[113] Local Competition Order, 11 FCC Rcd at 15997 ¶ 1008.

bill and keep at the edge plan. Because carriers would recover the costs of their networks from their own end users, rather than from other carriers, disputes over the application of access or reciprocal compensation charges not be relevant. The default rules of Qwest's proposal work the same way in the CMRS context as they do in the wireline context -- an originating carrier would be responsible for the cost of transporting a call to the "edge" of the other carrier's network, regardless of whether that transport is accomplished through self provisioning, using the other carrier's network, or transiting over a third-party's network. Generally, the cost of this transport link would be a relatively small portion of the total cost of transporting and terminating the call, thereby diminishing the incentives for arbitrage as well as the exercise of any terminating monopoly power. By shifting recovery to the CMRS carrier's own customers, bill and keep would subject such termination rates to market forces, particularly as competition continues to develop and the need for retail rate regulation diminishes.

As described more fully above, Qwest's bill and keep proposal would also clarify and simplify the rules for transiting and interconnection upon which CMRS providers also rely. Again, under bill and keep at the edge, originating carriers would be responsible for the cost of using a transit service provider to transport a call to a terminating carrier's network. Unlike today, however, the originating carrier would have no duty to pay reciprocal compensation to the terminating carrier. Additionally, as is also described above, originating and terminating carriers, would, in the CMRS context as in other contexts, have no need to enter into negotiations with each other regarding the rates, terms and billing arrangements for compensation for the use of each other's network unless it was efficient to do so. As the Commission is well aware, today's reciprocal compensation scheme creates tenacious problems in the relationships of ILECs and CMRS providers in particular, due to the burden of establishing such rates, terms and billing arrangements. Under Qwest's bill and keep proposal, this concern also would be eliminated.

3. The Commission Should Eliminate the Intra-MTA Rule, Regardless of What Action it Takes with Respect to Intercarrier Compensation Reform

Regardless of what the Commission does with respect to intercarrier compensation reform, the Commission should eliminate the "intra-MTA rule." Again, that rule provides that the local service area for calls originating on or terminating on CMRS networks is the MTA. The Commission, in the Local Competition Order, established this rule based on the following rationale:

> Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (*i.e.*, MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers.[114]

However, while this definition may avoid creating distinctions between CMRS providers, it creates the rate disparity and arbitrage problems described above. The Commission could eliminate most of these CMRS-specific compensation problems by simply eliminating the intra-MTA rule. The Commission should rule that the local service area for CMRS-LEC traffic is the same area as it is for LEC-LEC traffic -- the ILEC local calling area.[115]

4. The Commission Should, in any Event, Reaffirm that Transit Service Providers are Not Responsible for Compensating the Terminating Carrier When the Originating Carrier is a CMRS Carrier

Under the intra-MTA rule, the originating CMRS carrier pays reciprocal compensation to the terminating carrier. However, when originating carriers use a transiting carrier to deliver intra-MTA traffic, terminating carriers have often sought to recover access charges from the

[114] Local Competition Order, 11 FCC Rcd at 16014 ¶ 1036.

[115] The Commission should also eliminate the disparities that exist, in some LATAs between the defined local calling areas of ILECs and CLECs.

transiting carrier by erroneously arguing that the transiting carrier is an IXC and that the traffic is no longer local traffic. This problem often occurs where CMRS carriers are the originating carrier. Virtually every federal court to address such an argument by a terminating carrier has rejected it.[116] Again, however, if the Commission decides to retain the intra-MTA rule, it should reaffirm that the terminating carrier is to be compensated by the originating carrier, not by the transiting carrier.[117]

5. The Commission Should Clarify that Intra-MTA Traffic Need Not be Passed Through an IXC

The Further Notice notes that many rural LECs take the position that intra-MTA traffic must be passed through IXCs and therefore become subject to access charges and asks whether that rule should be eliminated to require that all such traffic go directly to/from CMRS providers and therefore become subject to reciprocal compensation.[118] Such an approach would be inefficient and unnecessary. The Commission should clarify that intra-MTA traffic need not be passed through an IXC to the extent that the Commission is convinced that such a clarification is necessary.[119]

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[116] *See, e.g.*, *3 Rivers Telephone Cooperative v. US West*, 2003 U.S. Dist. LEXIS 24871 (D. Montana 2003).

[117] The Commission, in the Further Notice, ¶¶ 139-40, also notes that certain costs/challenges exist with respect to CMRS providers obtaining ICAs with small ILECs and asks whether it should take action to help reduce those costs/challenges. Qwest believes that the adoption of this clarification -- prohibiting terminating carriers from assessing access charges against transit service providers -- would go a long way toward eliminating this problem.

[118] *See* Further Notice ¶¶ 135-37.

[119] Of course, as described above, should they establish an indirect connection utilizing a transiting arrangement, the transit service provider must be compensated.

D. The FCC Should Move Immediately To Adopt A Bill And Keep Structure For ISP Traffic

No matter how this docket ultimately is worked out, the Commission must deal decisively and immediately to move ISP-bound traffic to bill and keep status. The Commission clearly has the authority to do so, and the Commission's finding that keeping "reciprocal compensation" for ISP traffic is an economic train wreck remains unrebutted and, indeed, largely unchallenged. The recent action expanding the scope of the ISP reciprocal compensation arbitrage opportunity in the CoreComm proceeding[120] simply serves to highlight the importance of eliminating this serious anomaly immediately.

In the *ISP Remand Order,*[121] the Commission found that reciprocal compensation for ISP-bound traffic has been destructive of local competition and thus has directly undermined the goals of the Act. The Commission found that imposition of "reciprocal compensation" for ISP-bound traffic "has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets."[122] In particular, the Commission observed that "[b]ecause traffic to ISPs flows one way, so does money in a reciprocal compensation regime[,]" and as a result, "this lead to classic regulatory arbitrage that had two troubling effects: (1) it created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act; (2) the large one-way flows of cash made it possible for LECs serving ISPs to afford to pay their own customers to use their services,

[120] *See Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (2004), *appeals pending sub nom. In re: Core Communications, Inc.*, No. 04-1368 (D.C. Cir. Oct. 27, 2004).

[121] ISP Remand Order, 16 FCC Rcd at 9186-93 ¶¶ 77-88.

[122] *Id.* at 9153 ¶ 2.

potentially driving ISP rates to consumers to uneconomical levels."[123] In fact, the Commission found "convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these [arbitrage opportunities]."[124]

Based on these findings, the Commission went on to hold that "the application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets."[125] This is due to the fact that "ISPs do not receive accurate price signals from carriers that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of their ability to shift costs to other carriers."[126] Alternatively, "[e]fficient prices result when carriers offer the lowest possible rates based on the costs of the service they provide to ISPs, not when they can price their services without regard to cost[,]" an opportunity that exists when reciprocal compensation is required for ISP-bound traffic.[127]

These critical findings were not questioned by the Court of Appeals in *WorldCom*, and form the factual predicate for any rules dealing with ISP traffic. In other words, the FCC, if it were to continue allowing (and expanding) reciprocal compensation for ISP traffic, would be countenancing rules that the Commission concedes are contrary to its statutory mandate. Obviously, the Commission is not authorized to continue for very long rules that it agrees are not lawful.

There are a number of ways to approach the ISP compensation issue under the Communications Act. The soundest is for the FCC to simply establish special ISP rules pursuant

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[123] *Id.* at 9162 ¶ 21.

[124] *Id.* at 9153 ¶ 2.

[125] *Id.* 9183 ¶ 71 (footnote omitted). *See also id.* at 9165 ¶ 29 ("reciprocal compensation for ISP-bound traffic distorts the development of competitive markets.").

[126] *Id.* at 9183 ¶ 71.

[127] *Id.*

to its Section 252(b)(5) authority. As is noted above, the Commission's authority under Section 251(b)(5) extends to all intercarrier compensation matters, and the Commission is not constrained by the Act to adopt a calling party's network pays structure for intercarrier compensation. For all of the reasons correctly found in the ISP Remand Order, the FCC cannot continue its existing ISP reciprocal compensation rules. No matter how the transition to bill and keep is handled by the Commission, the ISP issue must be fixed immediately.

V. CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission take the actions described herein.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Robert B. McKenna

Blair A. Rosenthal
Robert B. McKenna
Timothy M. Boucher
Daphne E. Butler
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6650

Its Attorneys

May 23, 2005

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. ON FURTHER NOTICE OF PROPOSED RULEMAKING** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via email on Victory Goldberg, Pricing Policy Division, Wireline Competition Bureau (at victoria.goldberg@fcc.gov), and 3) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc. (at fcc@bcpiweb.com).

/s/ Ross Dino
Ross Dino

May 23, 2005